No. 979.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

THE STANDARD MARINE INSURANCE COMPANY, LIMITED, OF LIVERPOOL, ENGLAND (a corporation),

Plaintiff in Error,

vs.

NOME BEACH LIGHTERAGE & TRANSPORTATION COMPANY (a corporation),

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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We find some embarrassment in approaching this argument because of some manifest errors into which appellant has fallen respecting the facts. Any attempt at a categorical reply to them would tend to throw us out of all logical discussion of our subject, and we desire accordingly

to note at the outset that, though we may not in the course of our reply controvert all of what we think are his assumptions of fact, we do not wish on that account to be deemed to assent to them. We also feel that many of the facts upon which appellant dwells are not essential to any proper considerations of the questions of law raised by the appeal, and their presence seems to us inexplicable except upon the theory that they are intended, indirectly, to create suspicion in the mind of the court that the appellee is attempting to foist a corrupt claim upon an insurance company. Indeed, in the latter part of his brief, the intent is unveiled. To that attack it is sufficient reply to say that it is the usual cry which characterizes a bad case and is without foundation in fact. Neither the trial judge nor the jury seem to have been at all impressed with the attempt made in that direction in the lower court, and we feel satisfied that when this court has examined the record it will come to the same conclusion.

The facts of the case as we take them from the record are as follows:

In May, 1900, the appellant issued to the respondent its policy of insurance, covering certain merchandise laden on the barkentine "Catherine Sudden", for a voyage from the port of San Francisco to Nome, Alaska, "*at "ship's tackle or thirty days after arrival*". The policy contained two insurances, one on merchandise under deck valued at the sum of $5,250; the other on merchandise on deck valued at $3,000. The perils insured against are "of the seas, pirates, assailing thieves, jetti-

" sons, *barratry of the master* or mariners, and all other " losses and misfortunes that have or shall come to the " hurt, damage or detriment of the said property or in- " terest to which insurers are liable by the rules and " customs of insurance in San Francisco, excepting such " losses and misfortunes as are excluded by this policy" (Tr. pp. 18-19).

None of the cargo in question consisted of memorandum articles, and therefore it was all subject to the 50 per cent average clause of the policy:—that is, it was insured "free " from particular average and partial loss *unless occa-* " *sioned* by stranding, *sinking*, fire, collision or other " extraordinary *peril hereby insured against and amount-* " *ing to 50 per cent or more* on the sound value of the whole " shipment at the port of delivery, *and all such loss shall* " *be settled on the principles of salvage loss with benefit* " *of salvage to the insurers*" (clause 3 Tr. p. 20).

It is further agreed "that the provisions of the Civil " Code of California shall be conclusive and binding as " regarding *the warranty of seaworthiness*, liability of in- " surers in case of prior, subsequent or simultaneous in- " surance, *and such other questions as are therein legis-* " *lated upon and not otherwise provided for in this policy*" (p. 22).

The usual "sue and labor" clause is also incorporated in the policy (p. 19).

Under this policy there was laden on board said vessel *under deck* a miscellaneous cargo of provisions and groceries and 150 tons of coal (p. 128). The cargo is itemized on pages 141, 142 and 143 of the record, being that portion

of the cargo on the ship's manifest consigned to the "Nome Beach Lighterage & Trans. Co." *On deck* there was shipped three lighters and gear, the steamer "Dorothy" and six thousand feet of lumber. The lumber referred to is what is called a "knocked-down house". It is not lumber, properly speaking, but was sawed, fitted and ready to put together into a house. *None of it was merchantable lumber that would find a market* (pp. 145, 146).

The rest of the cargo named in the manifest *and which was the bulk of the ship's cargo* belonged to other consignees *and had nothing to do with this insurance.*

The vessel started upon her voyage on the 28th day of April, 1900, and proceeded without event until about the 30th day of May, when the vessel encountered large fields of drift ice. The master, exercising his discretion, sailed through the ice for several days, in company with a large number of other vessels, both sail and steam, (about thirty in number) all bound for the same place (p. 54). The ice appeared at first in fields of broken pieces and finally in large fields with passage ways through them, these passage ways changing as the ice moved. On about the third day, and while under sail, making headway through one of these open passages, the vessel struck a submerged cake of ice and stove a hole into her bow (pp. 54, 263-4-5). She was then run upon a cake of ice with a view of preventing her sinking, but she filled with water and went down so that but a very small portion of her upper deck remained above water. About 90 per cent of her was under water (p. 54). The passengers and

crew were compelled to abandon her, some going upon the ice and others on board of other vessels that came to their rescue. While in this condition, two sailing vessels, the "Rube Richardson" and "Pitcairn" came alongside and offered their services, and the master of the "Sudden" permitted them to take on board some flour and lard (p. 265) or flour and bread (p. 49) *which would otherwise have been lost and ruined* (p. 272), with the understanding that they would take it to Nome, and whatever salvage was due thereon should be there settled. About the third day after the sinking of the "Sudden" a steamer known as the "Corwin", equipped with pumps and appliances, came alongside. She drew the steam launch "Dorothy" and two barges off of the deck into the water, and subsequently under a salvage contract entered into with the master, towed this steam launch and barges to their destination. By that contract the master of the "Sudden" agreed to pay for salving the launch and barges the sum of $2500.00 in cash and to give the service of the crew and lighterage equipment to land the cargo of the steamer "Corwin" at Nome. He further agreed that the salvors should retain possession of the launch, barges and surf boats until final payment of the said salvage money. (The contract is set forth on pp. 223 and 224 of the record.)

When the "Corwin" began operations, the master of neither vessel expected that they would be able to save anything except the launch and barges (p. 267), and the master of the "Sudden" was prepared to abandon her. "We did not suppose he would ever get the 'Catherine "Sudden' up, *and if he did not have all the appliances in "the world he never would;* he would not have got the

" water out of her. *He had about 50 men and all the ap-*
" *pliances*" (p. 299).

Nevertheless the "Corwin" raised the "Sudden" and cargo from their sunken condition. They succeeded in getting her into a position where they were enabled temporarily to close the hole and pump her out and float her, thus finally succeeding in towing her to Nome. They arrived at Nome on June 10, 1900, when everything was unsettled. It was the first season of the Nome excitement. Twenty or twenty-five thousand people were stranded there (p. 96), and affairs were in a chaotic condition (p. 88). There were no courts or established modes of proceeding (p. 118). "There was no Court " there, and Captain Tuttle was the Court. They called " a meeting and decided what Captain Tuttle said was " law" (p. 59). "The government in that country at that time was entirely in the hands of the revenue officers, who took the place of the courts" (p. 121). There was no such thing as a market in "Nome" (pp. 96-7), and no means of raising money (pp. 88-89). Nobody's paper passed current (p. 100), and money was very scarce. It was held at exorbitant rates, and even on those conditions could only be had as a favor (p. 89). This was the initial venture of the Nome Beach Co., plaintiff, and carried the outfit intended for the beginning of business of that company at Nome (pp. 57, 149). There was no means for providing any funds for the Company except by means of the "Sudden" (pp. 57, 149-150). By another conveyance they had sent up an agent to represent them, and provided him with $3,000 in cash (pp. 146-149). Before the arrival of the "Sud-

den" this agent was taken sick with a fatal illness and had used nearly all of his funds (pp. 57, 112). A few hundred dollars that remained was applied to a partial payment of the wages of the crew stranded upon that inhospitable shore (pp. 57, 111, 112).

There happened also to be at Nome, upon their own business, two of the stockholders of the Nome Beach Co., Theodore P. Colcord and Fred C. Howard, who, while having no authority as agents for the company, yet as stockholders felt themselves interested in its welfare. Seeking some means of aiding the company in its dilemma, these stockholders applied for aid to Captain Humphry, the agent of the Pacific Steam Whaling Co., who was a personal friend of theirs. Captain Humphry was unwilling at first to undertake the matter, saying he had no authority to use the money of the Pacific Steam Whaling Co. for such purpose, but finally upon the personal guarantee of Colcord, Howard, and some other stockholders who were there present, agreed to take hold of it for the benefit of these stockholders (pp. 110,111). He accordingly advanced the $2500 due to the Corwin Co. on account of salvage in order to get possession of the launch and barges, and drew upon the company at San Francisco for that amount, with the understanding that he should retain possession of them and have the use of them until he had worked out the $2500 (pp. 116-117). Besides this $2500, the launch and barges were, before being turned over to Captain Humphry, and in accordance with the salvage contract, used for the discharge of the "Corwin" (p. 57). The reasonable value of this service was for the lighter $400 for ten hours' work, and for the launch

$50 per round trip for each tow of the lighter. The lighters were engaged in that service one day and one night, which would amount to $800. To this is to be added the $50 a round trip for the launch (pp. 280-292). It made at least one trip every hour for 24 hours (pp. 280-81), which would make somewhere in the neighborhood of $1,200.00 for the service of the launch. This, added to $800 for the barges, and $2500 cash, amounts to about $4500 in all for the salvage of the launch and barges.

At Nome the only anchorage is the open roadstead, which is subject to visitation of sudden and violent storms, and here the vessel on her arrival at Nome was necessarily brought to anchor. She had no means of propulsion, and was liable at any time to go ashore and become a total loss (pp. 101-108, 113-120). The cargo had then been wet with salt water for about eight days (p. 119), and so far as the groceries and canned goods are concerned, were greatly damaged. One witness testified that canned goods are good for nothing after being wet with salt water unless immediately washed. That he had handled goods wet for not more than a fortnight which were completely gone (pp. 107-08). Another witness, speaking of his portion of the cargo of groceries and canned goods, says that 60 or 70 per cent of it was destroyed and the remaining 40 per cent all damaged (p. 119).

Under these circumstances a board of survey was called, and the under-deck cargo, which included many consignments other than that of the Nome Beach Co., was surveyed by a competent board of surveyors, consisting of the ship carpenter on the U. S. revenue cutter "Bear", the

President of the Chamber of Commerce of Nome, and an experienced ship-master, who, at the time of testifying, was in the employ of the San Francisco Board of Marine Underwriters as their surveyor at Nome. This board of survey condemned the cargo and ordered it sold at public auction as it lay in the ship, deeming that for the best interests of all concerned. This auction was duly advertised and was proceeding before a large concourse of people when it was interrupted by a man named Gollin, who announced himself as the agent of the San Francisco Board of Marine Underwriters (of which board this insurance company is a member), and demanded to know what the proceeding was. At Mr. Gollin's request the sale was stopped and adjourned to permit him to investigate the matter, which he did to his own satisfaction, and thereafter gave his *express consent* as agent of the San Francisco Board of Marine Underwriters, to the sale (pp. 85, 86, 87 and see Certificate, p. 198; report to Underwriters, Ex. 3, p. 77). His authority is found in Ex. 1 and 2, pp. 67, 76.

In view of the attempt to raise suspicion as to the fairness of this transaction, it might be well at this point to consider the views of this agent on that question. He says (p. 87), "I am satisfied that everything was done that "any merchant or respectable set of men could do in "order to effect this arrangement and this sale. It was "fair and square and whatever I have done, after mature "reflection I would do again. My experience as an under-"writer of thirty years in this country is such that I "never, I may say, saw a fairer claim (p. 88). After I "made my investigation I returned to the sale and allowed

" the sale to go on. I simply said to these people that " everything was fair, and I was satisfied that the action " taken was for the best interests of all concerned."

Mr. Davis, General Manager of Appellant Company, says he knew Mr. Gollin ever since he was in business—has great faith in his ability, and always knew him to be upright (p. 61-62).

Before that sale the master had made efforts to treat with the salvors, but they would not recognize him, laughed at him (pp. 59-60) and claimed the right to the entire cargo, in which claim they were supported by the only authority then at Nome, namely, Captain Tuttle, of the U. S. Revenue Cutter "Bear" (55, 59, 269, 270, 273, 275). As already suggested, there were no courts and everything was in a state of chaos. In the language of the witness, "I had no resort to do anything" (p. 270). A similar demand was made upon the masters of the "Pitcairn" and "Rube Richardson" with a similar result (pp. 272-273).

The salvors took the same position when interviewed by Capt. Humphry (pp. 112, 117, 119).

So far as the cargo here in question is concerned, the sale netted $530.00 (p. 212), which was retained by the salvors to be applied on account of their claim against the cargo for salvage services. No part of it ever came into the possession of appellees (p. 152).

After news of the loss arrived in San Francisco the company was notified and given all the information it asked for respecting the loss. The proofs of loss were satisfactory to the company (p. 60) and an abandonment was also made to them (p. 64).

The general manager of the defendant company then told the plaintiff that in his opinion the proofs that were furnished were sufficient, *and the loss should be paid,* but he could not admit full liability, or liability, on account of being stopped by his re-insurers (p. 61). That if his re-insurers would follow, he would pay the loss; that the probabilities were that if he could not collect from his re-insurers, plaintiff would have to bring suit against him (p. 65).

This general manager further testified upon cross-examination by Mr. Van Ness that we "would like to see the " loss paid, and if you want an addition to that, *I think it* " *ought to be paid*" (p. 66).

The defense, which was nominally made in the name of the Standard Marine Insurance Company, is, in fact, made by the re-insurers, who are not parties to the suit, and with whom the plaintiff has no relation, contractual or otherwise, and to whom it owes no duties (p. 64).

The foregoing facts are principally, if not entirely, drawn from undisputed testimony in the case. But whether disputed or not, in view of the verdict (being in evidence) they must, for the purpose of this appeal, be treated as facts. The determination of questions of fact depending on conflicting testimony was for the jury, and is not open for reconsideration on this appeal.

The principal issues raised by the defense were as follows:

1. Besides formal denial of many of the averments of the complaint, it is alleged that "the plaintiff " sailed the vessel into the ice knowing full well that so

" to do endangered the safety of said vessel, and that so " to do was not consistent with good seamanship, or with " due and proper care, and that the plaintiff, when ice was " encountered, in the exercise of proper care, should have " changed the course of said vessel and sought open water " or a port of safety until danger from ice between San " Francisco and Nome had passed" (p. 28).

2. The survey, condemnation and sale of the underdeck cargo is admitted and attempted to be impeached by an allegation that the goods sold were of value greatly in excess of the price at which they were sold, and that with the use of the lighterage plant it could have been landed, and that the plaintiff did not seek to arrange with the Corwin Company for the landing or delivery of the cargo to plaintiff, or to secure from them a return or the delivery of any of the insured merchandise, and did not seek to arrange with them for salvage compensation, nor did they seek by way of purchase of said insured merchandise to recover it or otherwise to reduce the loss to the plaintiff or to the defendant.

3. They put in issue the seaworthiness of the vessel for the proposed voyage. At the trial this defense of unseaworthiness was limited, it being admitted by counsel that "there is no question but what she was seaworthy " so far as open water is concerned, but whether or not " sending that vessel up with Capt. Panno, who was in " charge of her, under instructions to get into Nome at " the opening of the season, they did not knowingly send " a vessel that was incompetent to go through the ice un- " der those circumstances simply to her death, if she went " in the ice. That proposition involves a technical

" defense on the question of seaworthiness, and " his Honor will instruct you in that regard. " * * * Whatever the fact might be as to " the 'Sudden's' seaworthiness in open water or ordinary " sea, we are not claiming that she was unseaworthy in " those particulars. Our claim is that she was not a ship " fit to be put into the floating ice of Behring Sea at that " season of the year. That is all the claim that we make." (pp. 45-46.)

The errors assigned are principally with regard to instructions to the jury, there being seventeen assignments for error in ruling on questions of evidence and fifty-five with respect to instructions.

ARGUMENT.

In this argument we propose to follow appellant in the order adopted by him, but preliminary thereto we have to notice a statement of fact which appears to be the basis of his argument throughout, wherein he has committed a fatal error. He says (Brief, pp. 2 and 3):

" Touching the liability of plaintiff in error in the event " of loss, the policy provided that all merchandise not " excepted under the memorandum clause was warranted " by the insured free from particular average and partial " loss, unless occasioned by stranding, sinking, fire, col- " lision or other extraordinary peril insured against, and " amounting to *fifty per cent. or more on the sound value* " *of the whole* shipment at the port of delivery, and that " such loss should be settled on the principles of salvage

" loss with benefit of salvage to the insurer. To make " the case one in which, *in view of this warranty, a recov-* " *ery could be claimed,* defendant in error alleged an " *actual* total loss."

It will presently be seen that this idea is the basis of his argument under points I and II, pp. 38 and 44 of his brief. In this statement he is, however, in error, both with respect to the nature of the warranty and with respect to the nature of the allegation of the complaint. The insurance, by its very terms, covers a *constructive* total loss. It is *only* "free from particular average and partial loss" when the damage is less than 50 per cent. If it amounts to 50 per cent. or more, it is to be "settled *on the principles of* " *salvage loss, with benefit of salvage to the insurer.*" How can a *constructive* total loss be more accurately described?

PHILLIPS says:

> "A constructive or technical total loss is one in which some part or remnant of the subject insured is surviving, or some claim accruing from it against third persons."
>
> 2 Phil. on Ins., §1487.
>
> "The part or remnant of the subject insured, which survives the peril in a total loss, is denominated salvage."
>
> Id., §1488.

The provision of the policy, therefore, that, on a 50 per cent damage "it is to be settled on the principles of salvage " loss with benefit of salvage to the insurer", is, when expressed in the language of the above definition, a provision that, if a part or remnant of the subject insured

amounting to 50 per cent or *less* survive the peril of a total loss, it is to be settled on the principles of a loss with a part or remnant surviving, the benefit of which remnant goes to the insurer. But such a loss "in which some part " or remnant of the subject insured is surviving," is, according to Phillip, "a constructive or technical total loss".

We do not think it necessary to enlarge upon this. It is the elementary language of marine insurance.

Neither, as claimed by appellant, have we in our complaint limited our allegation to "an *actual* total loss". The complaint in every instance alleges, in general terms, "a total loss by perils insured against", the language being (p. 5 and amendment p. 39), "that the whole of said mer- " chandise was totally lost by perils of the sea and other " dangers in said policy insured against". The language in the other two counts (pp. 9, 12 and 39) is, "the said " merchandise became a total loss, etc."

These allegations admit proof of a *constructive* total loss as well as of an actual total loss.

In *Snow vs. Union Mutual Insurance Co., 119 Mass., 592*, the allegation of the loss was in the same language as here employed, viz: "Said ship and her outfits, cargo " and stores were totally lost by the perils of the seas and " perils insured against in said policy." The court there said:

> "The allegations of a total loss, like the corresponding words in the policy of insurance, covers a constructive as well as an actual total loss. Heebner vs. Eagle Insurance Co., 10 Gray, 131. It is not necessary under our practice *to allege the abandonment or other facts necessary to constitute the total loss re-*

lied on. The evidence at the trial being sufficient to prove a constructive total loss by the cause alleged in the declaration, it follows that, according to the terms of the report, there must be judgment for the plaintiff for a total loss."

This is in strict accord with the practice in the United States courts as laid down by Judge Story in *Columbia Insurance Co. vs. Catlett, 12 Wheat. 396*, where it is said that:

> "There is no averment in the declaration that any preliminary proofs of loss were offered to the Company, nor of any promise to pay in 60 days after such proofs according to the terms of the policy, *nor that any abandonment or notice* was given to the Underwriters. It was, in our judgment, wholly unnecessary to aver the latter facts. *The abandonment* and notice thereof are but matters of evidence to establish *the facts of a total loss, which is expressly averred in the declaration.*"

The total loss there referred to was necessarily a constructive total loss, for the abandonment performs no office in an *actual* total loss.

> See also *4 Joyce on Insurance, p. 3523*, and cases cited.

The question, then, to be determined is, Was there under the facts hereinbefore narrated a total loss *either* actual or constructive?

Since the question proposed by appellant confines itself to an *actual* total loss, we will first take that question up for discussion, though we do not deem it necessary for a determination of the questions of law raised by the appeal. If we be right in the foregoing proposition that a

constructive total loss is covered by the terms of this policy, appellant's argument based upon the proposition that only an actual total loss is covered, goes for naught, and the court certainly committed no error in refusing instructions based upon the legal proposition that no recovery could be had except for an actual total loss.

We are prepared, however, to meet him upon his own ground: We say, even assuming that the policy was against *actual* total loss only, under the facts of this case a recovery would be had, for those facts disclose an actual total loss.

Stating our proposition in the form adopted by appellant (point I, p. 38), we say:

I.

THE LOSS UPON THE CARGO, OTHER THAN THE LIGHTERS AND LAUNCHES WAS CAUSED BY A PERIL OF THE SEA AND WAS INSURED AGAINST, AND HENCE PLAINTIFF IN ERROR WAS LIABLE THEREFOR.

Under the negative of this heading, appellant makes the proposition that as the cargo arrived at Nome "in specie" no loss as to it "was proven except such as resulted from " the sale of the goods upon the demand of the salvors as- " sented to by the agent of the insured". This is error as a statement of fact. We understand the error to arise from the mistaken construction of the policy above referred to. That is, appellant assumes the insurance to be against "absolute total loss only" and hence, means to state that if the goods arrive "in specie" *though damaged*, there is no loss proven *within the policy*. But the

policy being, as we have already shown, an insurance against *constructive* total loss, or what is sometimes called "total loss with benefit of salvage", under its very terms *a 50 per cent damage,* with abandonment, creates a total loss within the policy, even though the goods *do* arrive "in specie".

The authorities, too, upon which he bases his argument, bear the same infirmity. They are cases arising under a "free from particular average" policy, *unlimited with respect to percentage.* There is a great difference between a policy *absolutely* "free from particular average", and one only *conditionally* "free of particular average", for in the latter case, when the condition is fulfilled, the loss is no longer "free of particular average".

In other words, it "is a condition precedent, and when that is fulfilled the warranty against particular average ceased to have operation". *London Assurance vs. Companhia, 167 U. S. 165.*

Accordingly in *La Fonciere, etc. vs. Koons, 75 F. 111-112,* this Court said:

> "It is clear that the contract of insurance in question was not limited by the provisions of clause 3 if the loss sustained by the appellees amounted to 50 per cent. or more", etc.

The case of *De Mattos vs. Saunders,* upon the authority of which Mr. Barber makes the statement quoted, was "free from average unless general, or the ship be strand-" ed", and the ship was *not* stranded. The quotation from Barber speaks of it as "insured 'free of average' ". That author understands that "free of average unless general",

means "free of particular average" (Barber, p. 278), while the broader term "free of average" includes both general and particular average. So that, under either of the above provisions, the policy there referred to was, with respect to percentage of damage, unconditionally "free of particular average". That is, in effect, an insurance against absolute total loss only, and is defined by the Civil Code, §2711, as follows:

> "Where it has been agreed that an insurance upon a particular thing or class of things shall be free from particular average, a marine insurer is not liable for any particular average loss *not depriving the insured of the possession* at the port of destination of the *whole* of such thing, or class of things, *even though it become entirely worthless,* but he is liable for his proportion of all general average loss assessed upon the thing insured."

But, as we have already said, such was not our policy. Under its provisions a loss occurs if the assured be deprived of the possession of 50 per cent of the thing insured, instead of the *whole* of it; or if it be *damaged* 50 per cent. In other words, it is, as before demonstrated, a constructive total loss policy. See also, C. C., §2717, sub-sec. 1 and 2, and §2705.

De Mattos vs. Saunders cannot, therefore, afford a rule of decision for the case at bar.

I. An Actual Total Loss—Nevertheless, we contend that the uncontradicted evidence in this case establishes the fact within the meaning of the law, that the insured was *by a peril insured against* deprived of the possession of the *whole* of the under-deck cargo at the

port of destination, and hence has proved a loss within even a "free from particular average" policy as defined by the above provisions of the Code. We are thus, for the present argument, adopting the extreme position of the appellant.

Taking up his argument on this line, we call attention to the point he proposes. He says (p. 38), "But it is " claimed that the appropriation of the goods put on the " relieving vessels, by those vessels, and the sale of the " remainder of the cargo by the 'Corwin' to satisfy the " salvage lien of the latter, was a loss by a peril of the sea, " and within the protection of the policy. The court sus- " tained this contention and so instructed the jury. Can " this view of the law be sustained?"

This is not an accurate statement either of the claim of appellee, nor of the instructions of the court to the jury. *The court did not so instruct the jury, but* did instruct them as follows (Tr. p. 329):

" The accident to the vessel by which a hole was stove " in her bow and she was almost submerged, was a peril " of the sea from which the cargo under deck would have " been lost, but for the intervention of the salvors, who " applied themselves to the rescue. In this way the ves- " sel and cargo came rightfully into the possession of the " salvors, who thereupon and after arriving at Nome with " the vessel and cargo, claimed the whole of such cargo " under deck for salvage service, and, so claiming, perma- " nently deprived the owners of said property.

" There were no tribunals at Nome authorized to de- " termine the question of salvage, and no recognized an-

"When a vessel or other property is taken possession of by captors or salvors, of course the owner is dispossessed, at least for the time being, and, unless he can restore his possession by reasonable efforts the loss becomes absolutely total; but he is bound to use such efforts. * * * In short, if the property passes into the possession of captors or salvors, and the owners are thus in fact dispossessed, the loss becomes total, provided the owners cannot in either case recover the possession except by disproportionate exertions, expense, or hazard; otherwise it does not."

Monroe v. British & Foreign M. I. Co., 52 Fed. *789*.

" thority in that behalf other than the captain of the reve-
" nue cutter then at that place, and who, acting as arbiter
" in the matter, gave such cargo to the salvors, by whom
" it was sold, and thereby became and was a total loss to
" plaintiff within the meaning of the law, and for this loss
" the defendant is liable, *unless the plaintiff might, with*
" *reasonable effort on its part, have arranged with the*
" *salvors for an adjustment of the salvage claim and the*
" *delivery to it of the said cargo.*"

This is an accurate statement of the law and together with the 6th and 7th instructions following, left the question of fact as to whether the plaintiff might with reasonable efforts, have arranged with the salvors, to the decision of the jury.

The view of the law contained in this instruction *can be sustained.*

In his argument of this question appellant supposes what he calls "an extreme case", and which is indeed an extreme case, for it contains the unwarranted condition that the cargo bought up at auction was sold "to the per-
" son who is at the time acting as the agent of the in-
" sured" (p. 39). The record does not warrant the attempted application of any such assumed fact to the case at bar. The gist of his contention, however, appears in the following:

" Must it not be said in the case which we have sup-
" posed, and in the case at bar, that the damage suffered
" by the insured is not from a peril of the sea, but by rea-
" son of the improper and unlawful conduct of the salv-
" or? It seems to us quite clear that, in the case sup-

" posed and in the case at bar there is no legal causal con-
" nection at all between the accident and the subsequent
" loss to the insured resulting from the improper and un-
" lawful conduct of the salvor; that the latter within
" the meaning of the law, is a new, intervening and inde-
" pendent cause for which the insurer cannot be held re-
" sponsible" (Brief, p. 40).

This appears to be the foundation of the argument that the loss is not covered by the policy.

While we do not concede that the action of the salvors, under the conditions then existing, was "improper and unlawful conduct", yet even assuming it to be so, we reply:

1. That the action of the salvors was a peril of the sea within the meaning of the policy;

2. That even if it was not a peril insured against, it was nevertheless a peril to which the thing insured was exposed in the course of the rescue from a peril insured against that would otherwise have caused a loss, and permanently deprive the insured of the possession of the thing insured.

In either of these views a peril of the sea within the rule as applied to marine insurance was the proximate cause of the loss, and the insurer is liable for a total loss.

In taking up the above proposition, let us assume the very worst phase, namely, that the action of the salvors was plunder. Nevertheless, under the circumstances of this case, it was a peril of the sea.

The leading case upon this subject is that of *Boudrett vs. Hentigg, Holt's Nisi Prius Rep. 149.*

There, as contended in the case at bar, the goods had arrived at the port of destination, the insurance being on goods from London to the Isle of France. The ship was wrecked off the coast of that island, but some of the goods were saved from the wreck and got on shore there, where they fell into the hands of the natives, who destroyed part and plundered the rest. The assured claimed a total loss. It was objected to his claim that it was not a loss by peril of the sea, and plaintiff had given no notice of abandonment. The issue was thus squarely raised as to whether or not under these facts there was an absolute total loss by perils of the sea. The court overruled the objection and said:

> "That an abandonment is not necessary to make this a total loss. The cause of the loss was the perils of the seas and the portion of the goods which was saved from the wreck, though got on shore, never again came into the hands of the owners. It is therefore a total loss to them from the perils stated in the declaration."

The case is cited with approval in *Arnold on Insurance (7th edition, p. 1184)* as stating the law upon the subject.

Likewise in *1 Phillips on Insurance*, §*1107*, it is said:

> "The underwriters are answerable for loss by plunder in direct consequence of the insured subject being at the time put out of the possession and control of the master and other agents appointed by the assured, by shipwreck or other peril insured against, though theft or plunder is not specifically insured against; whether the pillage is committed on the water or on land. It is a general doctrine, that all the loss directly consequent upon a peril is covered by insurance against it. Pothier says 'the insurers are liable for loss by plunder on shore, after the shipwreck of the vessel'."

The same principle is recognized by the Supreme Court of the United States in *Peters vs. Warren Insurance Co., 14 Pet. 110.* Here Judge Story directly meets the argument of appellant in the case at bar wherein the latter claims that there is no legal causal connection between the accident and the loss to the insured from the improper and unlawful conduct of the salvors, for it is there laid down:

> "That the maxim causa proxima non remota spectatur is not without limitations and has never been applied in matters of insurance to the extent contended for; but that it has been constantly qualified and constantly applied *only in a modified practical sense* to the perils insured against."

The learned judge says:

> "If there be any commercial contract which more than any other requires the application of sound common sense and practical reasoning in the exposition of it and in the uniformity of the application of rules to it, it is certainly a policy of insurance; for it deals with the business and interests of common men who are unused to deal with abstractions and refined distinctions."

A large number of illustrations are then given of the relaxation of the strict rule of causa proxima, in cases of insurance, among which is one covering the facts in the Bondrett case.

So stands the case under the common law. The policy, however, makes the provisions of the Civil Code of California binding in this respect, and that Code lays down the law in conformity with the above decisions with perhaps a little more distinctness. §2627 provides that,

> "An insurer is liable where the thing insured is rescued from a peril insured against that would otherwise have caused a loss, *if in the course of such rescue the thing is exposed to a peril not insured against which permanently deprives the insured of its possession in whole or in part, or where a loss is caused by efforts to rescue the thing insured from a peril insured against.*"

This is a distinct qualification of the previous section of the Code regarding the rule of *causa proxima* as relates to insurance, and without further illustration would seem under the facts of this case to answer appellant's argument, based upon the idea that the appropriation by the relieving vessels of the goods put upon them and the sale of the remainder of the cargo by the "Corwin" to satisfy its salvage lien was *not* a loss by perils of the sea and within the protection of the policy. The thing insured was on a sunken ship at sea, and unless rescued from its situation must have been a total loss (ante, p. 3 & post 27, 28). It was therefore within the meaning of §2627, "the thing insured * * * " rescued from a peril insured against that would other- " wise have caused a loss". Were we, therefore, to concede to appellant for the purpose of argument, that the subsequent action of the salvors was "a peril *not* insured against", it cannot be controverted that the thing insured was exposed thereto "in the course of such rescue" and the insured was thereby "permanently deprived of its possession". So far as the under-deck cargo is concerned, no part of it ever came to the possession of the assured (ante, Rec. p. 52).

We have, therefore, the condition "which permanently deprives the insured of its possession *in whole*", or "of

"'*Sudden*'. I had no means to save her. I did all I could "to save her. As far as I was concerned she was a "goner" (Panno, p. 57). "*I* didn't expect, and *they* "didn't expect to save anything when they commenced "on it" (p. 267).

"We didn't suppose he would ever get the 'Sudden' "up; and if he didn't have all the appliances in the "world he never would; he would not have got the water "out of her. He had about 50 men and all the appli- "ances" (p. 299).

GOLLIN says: "I venture to say that the services ren- "dered by the 'Corwin' were such that no other steamer "would have rendered. They could not. They would "not have taken the steamer. Any passenger steamer, "loaded with passengers as they were, would only have "taken the crew off of the vessel, and would have left "the Catherine Sudden' to founder. The 'Corwin' was "particularly fitted for such an enterprise that might "come along" (pp. 86, 87).

The "Corwin" was herself hastening to Nome with an outfit to begin business, and, like the rest, no doubt deemed it important to get there at the earliest possible moment.

It is not necessary to go into much detail with regard to the merits of this salvage service, nor into the claim of the salvors that they were entitled to the *whole* of the proceeds. The value of the service was established by the only available tribunal at Nome, Captain Tuttle, of the Revenue Cutter "Bear", who decided that the salvors *were* entitled to the whole. If they were not entitled to the whole, still under the above facts the jury are cer-

tainly warranted in allowing *at least* 50 per cent of the cargo for such service. For this the salvors had a lien and were entitled to retain the possession. The portion taken out of the "Sudden" by the "Pitcairn" and "Rube Richardson", amounting to about 10 tons, was also subject to a like claim and a like lien.

This salvor's lien was a direct loss under the term "perils of the sea" as used in the policy.

> "The liability of the underwriter for salvage depends not upon his having engaged to indemnify against it by any express words in the policy, but upon its being made by the law of the land, or the general law maritime a direct and immediate consequence of perils against which he does insure.
>
> "Hence, in order to recover salvage expenses, the assured need not, and in fact ought not, to declare for loss by the payment of salvage; but he should declare as for that species of loss which occasioned the payment of salvage—as, for loss by perils of the sea, in case of salvage from shipwreck; for loss by capture, when the salvage is a remuneration to recaptors."
>
> 1 Arnold on Insurance, §863, 7th Ed.
>
> Peters vs. Warren, 14 Pet. 110.
>
> "Although salvage expenses, moreover, were formerly regarded as only coming under the 'sue and labor' clause of the policy, the House of Lords in the case of Aitchison vs. Lohre, 4 App. Cas. 755, above referred to, held them to be directly within the insurance against sea perils; although when the service has been engaged by the master or owner, it may be *also* within the sue and labor clause. So far, therefore, as they are a charge and a lien upon the ship, and thereby a 'hurt, detriment and damage to her', the insurers by the very terms of the policy are directly answerable to the assured who has paid them.

> "As above observed, moreover, salvage expenses are not necessarily a general average charge. They are not so when made necessary, as not infrequently happens, by negligence in navigation. The Irriwaddy, 171 U. S. 189, 18 Sup. Ct. 831, 43 L. Ed. 130. Then they are in effect *particular average* (though not so within the memorandum, Price vs. Ins. Assn., 22 Q. B. Div. 580), to be borne by the shipowner, and hence by his insurer."
>
> International Nav. Co. vs. Atlantic Mutual Ins. Co. 100 Fed. *313*. Affirmed, C. C. A., 108 Fed. 987.

To the foregoing add the following from 2 Parsons on Insurance, 151, Note 1:

> "As salvage expenses are to be computed in making up a total loss, Bradlie vs. Maryland Ins. Co., 12 Pet. 378, 400, it follows that, *if they amounted to more than half the value of the vessel,* the assured would not be obliged to pay the salvage to prevent the sale, but might abandon, and claim a total loss."

See also cases herein, post p. 31

In the case at bar the abandonment to the insurance company is conceded. Under these circumstances, there was, independent of the sale, sufficient evidence to prove a constructive total loss under this policy.

(b.) Justifiable Sale—The cargo was, however, a constructive total loss in another sense. It was sunk and damaged. It was brought into the roadstead at Nome, but *when there, it was not yet relieved from peril.* All the witnesses testify without contradiction that, lying as it did in the open roadstead, it was in constant danger of going ashore and being destroyed—and that was, in fact, the fate of the vessel.

"A vessel in the condition that the 'Catherine Sudden'

" was in, being in such a dilapidated condition, practically " a wreck, she would certainly have gone on to the beach, " and everything would have been lost" (GOLLIN, Tr. p. 86).

" I was not going to take the chance of a storm coming " up. The vessel could not get out of the way. If a storm " came up she was bound to be lost" (GOLLIN, p. 98).

"The ship lay about a mile and a half or two miles off " the beach, without spars, sails or any propelling power " whatever, which left her in a very dangerous condition. " If a gale of wind came along she had nothing to get off " shore there, as the other vessels had. The weather there " is very catching. We are liable to get a gale there at " anytime" (HERRIMAN, p. 101).

" The real basis of my suggestion or recommendation " that the cargo be sold, instead of lightering it to the " shore, are three: First, the state of the weather at " Nome, the liability for a gale of wind to come on at any " minute and lose the whole; second, that the cargo had " been submerged with salt water, and the longer it stayed " there the more it would deteriorate; third, there was no " such thing as warehouse facilities to put that cargo in " when it got ashore; no place on the limit—on the beach " within the limits of Nome, taking it from Snake River to " the Standard Oil Works, where that cargo would have " been kept intact" (HERRIMAN, pp. 108-109).

" I am acquainted with the beach there. Have been go- " ing up there since 1898. Storms were likely to come up " on that beach at any time. There is no period of guar- " anteed fine weather that I know of there. Under such

" circumstances, a vessel lying at anchor about two miles " off shore, with no propelling or motive power, would be " practically a wreck. If she had no motive power, she " could not get away from there. If she was not taken " away, she would go ashore" (Hibbeed, p. 120).

Hence, the cargo on board was, at the time of sale, by reason of a peril insured against, in danger of absolute destruction, and then and there the proper subject of abandonment. It will be remembered that the insurance ran "until 30 days after arrival at port of destination", and so did not cease on dropping anchor, as is the rule where the insurance is only between named ports. As experienced men upon the ground, all the witnesses agreed that it was for the best interests of all concerned, that the goods be sold. Of this opinion, too, was Mr. Gollin, the agent of the underwriters. It was duly surveyed by a competent board of surveyors who recommended the sale, which was consummated with the consent of Mr. Gollin. Whether the sale might or might not have been differently conducted, so as to bring a larger return, of which appellant makes complaint, it would still have been a sale—a justifiable sale according to the undisputed testimony, and hence the assured was by a peril insured against (viz: the conditions which made the sale proper), permanently deprived of its possession at the port of destination.

Assuming now that the stores on the "Rube Richardson" and the "Pitcairn", and the coal alleged to have been taken on the "Corwin" were the property of the assured and were not lost, it is certain from the testimony that they did not amount to anything like 50 per cent of the cargo. While it is testified that the cargo so taken out was about

10 tons, it appears that the coal alone, covered by the insurance, amounted to 150 tons.

Now, where vessel or property is justifiedly sold after damage by perils insured against and condemnation, it is a total loss without abandonment.

> "The money arising from the sale in such case must be held by the master for the use of the underwriters; it is their property without any abandonment; *and if it come to the hands of the insured* it may be deducted from the loss as so much paid, this being what is called a total loss with benefit of salvage."
>
> Gordan vs. Mass. F. & M. Ins. Co., 2 Pick. 261.

So far, therefore, as relates to the sold cargo, it was an absolute total loss, and with the abandonment of the "Pitcairn" and "Rube Richardson" portions, the whole became a constructive total loss, even if the salvage lien were not a peril of the sea.

(c.) Sale Was Justified as the Only Legal Mode Under the Terms of the Policy of Adjusting the Loss—In the foregoing it will be noted that the percentage of damage is fixed by the testimony of witnesses directly to the percentage, and also by the claim of the salvors. This, however, is not the only evidence before the jury upon the subject, and upon which a finding of the proper percentage could be based. We refer now to that provision of the policy requiring the loss to amount to 50 per cent or more "on the sound value of the whole ship at the port of delivery".

It will be remembered that besides the groceries and canned goods, the under-deck cargo consisted of 150 tons

of coal, all insured under the single valuation, "$5250 under deck".

The testimony fixes the sound value of this coal at the port of destination at figures varying from $30 a ton (Hibberd, p. 120), up to $90 a ton (Moore, p. 251). Pope fixes the fair valuation of coal during that month at $50 a ton (p. 243).

An attempt is also made to place a valuation upon the lumber as high as $150 per M, and alongside ship in the harbor at $85 or $90 per M (Pope, pp. 244-245). Of course this means marketable lumber, which the testimony shows was not the nature of the lumber in the present cargo.

Taking the valuation of the coal at its lowest figure ($30 a ton) the sound value at the port of delivery of this 150 tons covered by insurance would be $4500. No doubt with the addition of the groceries and provisions this sound value would be largely increased. It is, however, sufficient for our present purpose if it shows that the sound value at the port of delivery of the whole cargo was *at least* $4500. All increase upon that amount would be in our favor, since, as we shall presently see, it would increase the difference between the sound value and damaged value, and so increase the percentage of loss.

Now, under the law, the proper mode of ascertaining the percentage is to compare this sound value at the port of delivery with its damaged value at said port, and thus establish the percentage of loss. But under the law the damaged value is to be ascertained *by a sale on arrival.*

"The damaged goods *are to be sold on arrival,* and

> the gross proceeds compared with the market value of sound goods at the port of discharge; and the ratio of the loss to the sound value, as thus ascertained, is the proportion to be paid by each underwriter upon his policy."
>
> International Navigation Co. vs. Atlantic Mutual Ins. Co., 100 Fed. 317-318.

So also the Supreme Court, speaking of the cases which establish the rule, says:

> "Those cases hold that the damaged goods, upon reaching their destination, *must be at once sold* for the best price that can be had. It is then to be determined what the goods would have been worth in the same market had they been sound; and the *difference* between the sound value *and the proceeds of the sale* of the damaged articles, gives the ratio of deterioration, and the underwriter is to pay this ratio or percentage of loss on the policy value."
>
> London Assurance v. Companhia, 167 U. S. 171-172.

The goods were sold as the law requires, and brought $530, which sum should be reduced by whatever is due to the salvors. Taking, however, the full sum of $530, we have a ratio of deterioration amounting to about 90 per cent, and the more we increase the sound value above $4500, the greater is the percentage of the loss.

By this means alone, the 50% damage is proven and a total loss within the terms of the policy established.

(d.) The Consent of the Agent of the Insurance Company—The foregoing argument leaves out of the question the fact that the sale was made with the express consent of Mr. Gollin, the agent of the Insurance Company.

The fact of his giving his consent is uncontradicted, but

the attempt is made to impeach the transaction by the suggestion that he exceeded his authority, or that he was deceived and did not know what he was doing.

So far as the latter suggestion is concerned, Mr. Gollin on the stand testified that he considered the proceeding perfectly fair, and whatever he did in the premises after mature reflection he would do again (p. 87). That if he had known the lighterage plant was there, he would still have advised the sale (pp. 99-100). We do not deem the discussion in which appellant indulges upon this point (Brief, pp. 67-70), within the province of the present appeal. The question, *if there be any,* was passed on by the jury adversely to appellant's contention.

But we feel equally certain that the part he took in the sale *was within* the authority conferred upon him. His appointment (p. 67) recites that,

"Cargoes may be jeopardized and losses sustained, " which it is supposed might be prevented by the exertions " of a trusted agent: Therefore it is deemed useful to " appoint an agent with power to act in preserving the " property for the benefit of whom it may concern." He is therefore appointed agent at Cape Nome "to *take* " *measures for preserving* and defending of property in- " sured by the respective organizations, etc.".

Under the head of "Sea Damage" (p. 71), he is instructed regarding the *manner of sale* of goods.

Under the head of "Auctions and Auctioneers" (pp. 74-75), he is instructed in *case of public sales* to "see that sealed tenders are advertised for, etc.", and he should also "endeavor whenever a public sale is

" necessary, *to have a voice in the appointment of the* " *auctioneer*, and should see that due publicity of sale is " given".

Under the head of "COMPROMISE", he is instructed that, where the expense of notarial documents, advertisements *and other charges of public sale* would be much increased, and the claim is small, he "may agree to an ap- " praised damage to the goods" (p. 75).

It is also contemplated that the salvage proceeds, using the term in the sense of the proceeds of the sale, *might pass into his hands*, and he is instructed what to do with them (p. 76).

By a special letter accompanying this appointment "Exhibit No. 2", he is told that an agent's duty is chiefly to *advise* the responsible parties.

All these point directly to the power of the agent to consent to the sale if he deems it for the best interests of his principal. Certainly a direction to endeavor to "have " a voice in the appointment of the auctioneer", implies a power to consent to the sale; for how can he appoint an auctioneer without making the auctioneer his agent? So, also, a direction that "sealed tenders shall be advertised for", is a consent to the sale, for what is a tender but a bid to purchase? The further direction that "the sale " should take place within a reasonable time after the " cargo is landed, etc.", contemplates a consent to the sale. The duty "to advise the responsible parties", contemplates a consent to the sale, for if he "advise" a sale does he not "consent" thereto? We do not think that the

court will have much difficulty in finding the necessary authority in the foregoing appointment.

But if he did not have such authority, by virtue of his appointment, his act in this regard was ratified by the defendant. The fact that he "had consented to the sale" had an effect on Davis' judgment when, upon presentation of proofs of loss, he said the loss should be paid (p. 61). He knew him, had faith in him and "was thoroughly satisfied with what he did" (p. 62).

If he had the authority to consent for the Underwriters and did consent to the sale as the best mode of preserving the property, does it not seem absurd for the appellant to attempt to deny total loss?

How much more absurd, however, is their attempt to discredit the act of the agent in consenting to a sale, when, as we have just shown, *the sale was the proper mode under the law to determine the loss.*

II.

THE SALVAGE TO LAUNCH AND BARGES.

It is next contended that the trial court erred in holding that the plaintiff in error was liable for the whole of the $2500 paid for the salvage service of the lighterage plant.

This contention, like the one respecting the cargo under deck, is principally based upon the assumption that the policy is an absolute total loss policy, and also assumes that the right of recovery for the barge and launches can only be justified under the "sue and labor clause".

1. A Total Loss by Perils of the Sea—In both of the above respects he is in error. The policy is *not* "free of average". Moreover, by the authorities just considered we find that salvage may be recovered under the policy as a "peril of the sea", as well as (where, like in this case, it was contracted for by the master) under the "sue and labor clause".

Appellant refers to it as a payment of only $2500 salvage, and to that part of the court's instruction which speaks of the reasonable value of services rendered the "Corwin" in discharging, as based on "certain hearsay testimony" (p. 47). This is an error. The salvage contract is in evidence, introduced by appellant, showing that the assured was to pay $2500 cash and give the use of the launch and lighters for the discharge of the "Corwin" (Rec. 223-224). We have also the direct testimony of Capt. Panno, who made the contract, to the same effect. Speaking of the employment of the tugs by Captain Humphry, he says: "He first employed them to " take the cargo out of the 'Corwin' *in accordance with* " *my contract as part payment of the salvage*" (p. 57). " I made an arrangement at that time with the 'Corwin' " people with regard to the lighterage plant which was " on board. There was a written agreement signed at " that time between myself and the Captain of the 'Cor- " win', etc." (p. 266).

* * * * * * * * * *

" I did not pay any attention to the 'Dorothy' after I " got to Nome with respect to the discharge of the 'Cor- " win'. *I told Captain Simmie what I had agreed upon* " *and he done all that work*" (pp. 299-300).

Then follows the testimony referred to by appellant, of Capt. Simmie:

"I was informed by the captain of the 'Sudden' that "he had made arrangements with the Corwin Trading "Co. to lighter their cargo—that is, use the Nome Beach "Co.'s lighter and a small lighter belonging to the Corwin "Co., loaded with freight from the steamer to the beach. "I did that" (p. 280).

The value of those services is shown to be $2,000 (ante, p. 8). This testimony is uncontradicted. The assured, therefore, gave in value for said salvage services $4500.00 instead of $2500, as suggested by appellant.

Therefore, under the authorities just considered, the loss by the "*perils of the sea*" exceeds the value of the property fixed in the policy by at least $1500, and hence there was an absolute total loss of them under the policy. Plaintiff was, therefore, entitled to $3000, the value fixed in the policy.

2. Entitled to $4500 Under "Sue and Labor"—(a.) Taking as a basis for his first objection under this subhead, the theory that the policy is against actual total loss, only, appellant complains of the refusal of the court to substitute for the instruction actually given (No. 3, p. 328), one proposed by him, which, as stated in his brief, might lead to a misunderstanding. He says:

"Upon these authorities we requested the trial judge "to charge the jury (Trans. p. 313, request No. 8) that "defendant in error, plaintiff below, could not recover any "portion of the amount paid by it to the salvors for "the salvage of the lighterage plant, or any portion of

" the value of such service, if, in fact, said plant or any " material portion thereof, was not at the time the captain " of the 'Sudden' made his bargain with the salvors to " pay $2,500 for their towage into Nome, *in danger of* " *being lost* by reason of the accident to the 'Sudden'."

The instruction asked was as follows:

" Plaintiff cannot recover from defendant any portion " of the amount paid by it to the salvors for the salvage " of the lighterage plant, or any portion of the value of " such service, if, in facts, said plant, or any material " portion thereof, was not, at the time that Capt. Panno " made his bargain with the salvors to pay $2,500 for " their towage into Nome, in danger of being lost by " reason of the accident to the 'Sudden'. If from the " evidence you find that at the time Capt. Panno made " his bargain with the salvors for the towage of the light- " erage plant into Nome, that plant was not *in danger* " *of being wholly and totally lost*, then and in that case " your verdict should be for the defendant" (Tr. p. 313).

The difference is at once apparent, as this instruction makes it a condition that they be "in danger of being *wholly and totally lost*", which carries out the theory that the policy is "free of particular average". If our construction of the policy be right, this instruction was on that ground alone properly refused. It was further properly refused because, as we have just shown, the amount was recoverable as a total loss by "perils of the sea" and did not depend upon the "sue and labor", for its allowance.

It was still further properly refused, because adopting

appellant's own theory, the evidence did not warrant the assumption that they were not in danger of total loss. Appellant in this view, assumes that the salvage contract was entered into not because the outfit was in danger of loss, but to expedite it to a profitable employment (p. 49). In his argument to this end he has not only overlooked the contract itself, as well as mistaken the testimony of the witnesses, but has invaded the province of the jury by drawing inferences—which inferences are wrong. We refer to his argument that it is apparent in the nature of things that they were in no danger.

The salvage contract which was introduced in evidence by the appellant (p. 222-223), recites, that the "steam " launch, barges and surf boats are now adrift in the ice " in the Behring Sea and *in great danger of total loss " and destruction"*.

The testimony when properly read, is to the same effect. While it is true that Captain Panno said that it was his intention to steam the launch into Nome with the scow in tow, the statement was qualified with the suggestion that he would follow behind the "Pitcairn" and have a line from her to help him (p. 298), which was precisely the service rendered by the "Corwin", and which would simply have transferred the salvage claim from the "Corwin" to the "Pitcairn".

Neither did Captain Panno testify with respect to the steam capacity of the launch in the manner in which the quotation in appellant's brief would lead one to believe (p. 49). He said: "She is a small launch. She has " *as* big a steam capacity *as she ought to have to her*

" *size. I do not know anything about what it is*" (Tr. p. 300).

Her true steam capacity is fixed by Captain Simmie, her master, who says: "We could not put more that 2½ " tons in the bunkers. They would not carry more than " that" (p. 301).

When it is remembered that they were adrift in the ice of Behring Sea, a hundred miles, or more, from their destination, it would seem that from this cause alone they were in danger of absolute total loss. This, considered in connection with the testimony hereinbefore referred to regarding the nature of the sea in which they were adrift—subject to sudden and violent storms—and with the further fact that without aid they must have been overladen with their passengers and provisions, it would seem that the recital of the salvage contract stated the exact truth. Captain Simmie gives the true explanation of the intention of the parties, in the following language:

" I expected to require it to get ourselves to the place " of destination *if we possibly could.* * * * That was " our only means of preservation *and we were taking* " *those chances*" (p. 302).

3. Sum at Risk—Under this heading (p. 50), it is urged that the court erred in holding the plaintiff liable for the *whole of* the $2500 paid for the salvage service.

We have just seen that the value contributed for this salvage service was more than $2500, and was in fact $4,500. We have further shown that it was recoverable as a loss by the peril of the sea, and hence, to the full amount of the policy, or $3,000.

We further contend that it was recoverable under the "sue and labor clause" in accordance with the fourth cause of action in the complaint, and in that view, to the extent of $4,500.

The appellant's objection to this is based upon the construction placed by him upon the term, "sum at risk", contained in the sue and labor clause, his contention being that this amount is not controlled by the valuation in the policy, but by some other indefinite value of the interest to be ascertained by extraneous testimony (Brief, p. 51). He suggests that the error of the trial judge in this connection was "in reading the words 'sum at risk' " to mean the sum at the risk of the insurer" (Brief, p. 52). Of course the record does not show any such reading.

The portion of the "sue and labor clause" necessary to be considered is in the following language: "To the " charges whereof this Company will contribute in pro- " portion as the sum insured is to the whole sum at risk" (Tr. p. 19).

The entire argument of appellant shuts the eye to the nature of the policy in question, and attempts to construe it as if it were not a valued policy, and further, as if the insurance were only a partial insurance, instead of as in the case at bar, an insurance up to the full valuation.

In the first place, this is a valued policy, and the valuation is conclusive between the parties for all purposes. There is no fraud charged in arriving at the valuation, neither has the cargo been hypothecated by respondenture before its insurance.

Under these circumstances, the Code provides, §2736, that,

> "A valuation in a policy of marine insurance, is conclusive between the parties thereto in the adjustment of either a partial or a total loss, if the insured has some interest at risk."

Arnold states the same rule, I Arnold on Ins., 7th Ed., p. 411, in the following comprehensive language:

> "There is by English law no exception to the rule under discussion. As long as the contract of insurance remains unimpeached, the valuation in the policy can *under no circumstances be opened;* or, to use the words of Cockburn, C. J., 'Where the value is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, *then in respect of all rights and obligations which arise upon the policy of insurance,* the parties are estopped' from disputing the value stated."

The foregoing language of Cockburn, Judge, is from the case of Insurance Assn. vs. Armstrong, L. R. 5 Q. B. 248.

In The Potomac vs. Cannon, 105 U. S. 630; 26 L. Ed. *1195,* the Supreme Court of the United States relying upon the above case said concerning the valuation:

> "That valuation is conclusive in respect *of all rights and obligations arising upon the policy of insurance."*

See, also,

> Providence SS. Co. vs. Phoenix Ins. Co., 89 N. Y. 565;
>
> The St. Johns, 101 Fed. *474.*

The "sum at risk" by the assured is therefore fixed by the terms of the policy.

Now appellant complains that because in the present instance the "sum at risk" as fixed by the policy, *happens to equal the sum insured*, in other words, because it is a *full* insurance instead of a partial insurance, the insurance company is called upon to pay the *whole* of the "sue and labor" expenses instead of a part of them. The answer to this is, Such is your contract. Had you desired otherwise you should never have insured up to the full value. You have agreed to pay these expenses in proportion as the sum insured is to the sum at risk. Since the sum insured happens to equal the sum at risk, you have agreed to pay the whole.

Following up that idea, appellant further says: "It " will be observed that, under this construction the limi- " tation of liability is not even measured by the amount " of the insurance, and that giving to the phrase its full " force, the insurer could be called upon to pay, by way " of suing and laboring expense *more than the amount in- " sured*. A construction which leads to this result would " seem to be absurd" (p. 53).

Such an argument is equivalent to saying that the elementary principles of the law of insurance regarding this subject are absurd, for it is the established principle of that law that expenses payable under the "sue and labor clause" *are in addition to a total loss if that afterwards occur*. C. C., §2743.

> "The assured may recover, under a marine policy, the value at which the subject is insured, and also the amount of expenditures in addition to a total loss."
>
> 2 Phillips on Ins., §1742.

Stress is laid upon the word "whole" and the attempt made to construe it to imply a value other than the agreed value. If there were any virtue on this suggestion it would be more than fairly met by the fact that the "sue and labor clause" is a printed portion of the policy, while the valuation is written, and necessarily varies with each policy. Where there is a partial insurance, and hence the "sum insured" less than the "sum at risk", the word "whole" would satisfy the most fastidious criticism, for the antithesis would then be broader and more apparent.

The policy itself, however, bears internal evidence that the "sum at risk" was understood by the parties to be the valuation, for the policy has this provision: "Risk " hereunder to cease at ship's tackle, or thirty days after " arrival of vessel at destination, upon merchandise *$3,000* " *on deck, $5,250 under deck,* laden, etc." If our construction of the policy were open to question, it would seem that this language would be decisive in our favor, as defining what is meant by the "sum at risk".

Finally, it is a well settled rule of construction, that if there be any ambiguity in the terms of the policy, such ambiguity is construed in favor of the assured and against the insurer.

> Wallace vs. German-American Ins. Co., 41 Fed. 743-44;
>
> London Assurance vs. Companhia, etc., 167 U. S. *159-160.*

The absence of authority on this question, to which appellant refers (p. 45), is in our view undoubtedly accounted for by the fact that "it had never before oc-

curred to anyone'' to make the contention advanced by him. For it is generally understood, as said by Judge Sanborn (Delaware Ins. Co. vs. Greer, 120 F. 920-21, C. C. A.), that,

> ''Contracts of insurance, however, are not made by or for casuists or sophists, and the obvious meaning of their plain terms is not to be discarded for some curious hidden sense, which nothing but the exigency of a hard case and the ingenuity of an acute mind would discover.''

III.

THE NEXT CONTENTION IS, THAT THE COURT ERRED IN REFUSING TO TAKE FROM THE JURY THE QUESTION AS TO WHETHER OR NOT THE PLAINTIFF HAD MADE SUCH REASONABLE EFFORTS FOR THE SECURITY, PRESERVATION, RELIEF AND RECOVERY OF THE PROPERTY INSURED AS REQUIRED BY THE "SUE AND LABOR CLAUSE' (p. 55).

This question was fairly submitted to the jury under the instruction of the court regarding the duty of the assured in that respect, but it is claimed by appellant that the court should have given a peremptory instruction to the jury to find for the defendant upon this proposition, upon the theory that the evidence was without conflict, and entirely in his favor.

1. In the first place, we are not prepared to concede it to be the law that the breach of this warranty forfeits all claim under the policy, notwithstanding the court so instructed the jury.

It has been held by respectable authorities, not the

least of which is Chief Justice Kent, concurring in the opinion of Justice Yates, that where an abandonment has been made to the underwriters the agents of the assured are answerable to the insurer for their defaults, if any exist in this respect, and *the rights of the assured* are not affected.

> Gardere vs. Columbian Ins. Co., 7 Johns. 520;
> Walden vs. Phoenix Ins. Co., 5 Johns. 324;
> Center vs. American Ins. Co., 7 Cowan 229;
> The Brig "Sarah Ann", 2 Sumn. 210;
> Dickey vs. American Ins. Co., 20 Am. Dec. 766.

Our Code provides that (§2726),

> "Upon an abandonment, acts done in good faith by those who were agents of the insured in respect to the thing insured, *subsequent to the loss, are at the risk of the insurer* and for his benefit."

This relates back to the time of the disaster.

> Dickey vs. American Ins. Co., 20 Am. Dec. *766.*

It is further flatly held that the failure to observe the "sue and labor" obligation, does not forfeit the right to recover, but if the loss is made greater by such failure, than it otherwise would have been, the excess alone so occasioned, cannot be recovered.

> Franklin Ins. Co. vs. Cobb, 2 Cin. Sup. Ct. 90-93;
> May vs. Cincinnati Ins. Co. 20 Ohio 228-30, citing
> Gardere vs. Columbian Ins. Co., 7 Johns. 520.

In this respect, therefore, the instruction may have been *more favorable to appellant* than it should have been. If so, it is no cause for complaint on his part.

2. In the second place, the evidence upon this question was of such nature, as rather to warrant a peremptory instruction for the *plaintiff* than for the defendant.

It is not the duty of the assured under the "sue and labor" clause to go to the extremity urged by the appellant for the purpose of complying with that obligation. He is only bound to use *reasonable* means, or as it is sometimes put, he is *not* bound to exercise disproportionate exertions, expense or hazard.

> "'This clause in the policy defines the duty of the assured and their agents, in regard to the security, preservation and recovery of the property after the disaster; and the question is presented to you, therefore, whether such loss or misfortune happened, and whether, after it did happen, the defendants, and their agents in charge of the insured property, used all reasonable and proper means for the security, preservation, relief and recovery of the property insured. This is a question addressed to your sound judgment, in view of all the circumstances and all the evidence. Place yourselves in the position of the insured, and their agents in charge of the property at the time, and decide whether that provision has been fairly kept. *The question is not whether the best plan was adopted to save the property, or whether all was done that might possibly have been done by men of greater skill and more determined perseverance, but whether every reasonable and proper means was used.*'
>
> "I do not mean that any faint and waivering efforts would suffice to relieve the defendants from responsibility under this provision. There must be a use of all 'reasonable and proper means', by which I understand such means as 'a prudent, uninsured owner', would be expected to use under like circumstances."
>
> Franklin Insurance Co. vs. Cobb & Armel. II Cin. Supr. Ct. Rep. 90-91.

Accordingly it has been held that, in the case of the seizure of property at a sale by a prize court in New Orleans, where the question arose whether the sale ought to have been prevented by the assured giving bail, that *considering the fluctuating value of American currency at that time*, no prudent man would have given security to the full amount, and that the sale, therefore, not being a gratuitous act of the assured, was one of the direct and immediate consequences of the original seizure. Says the court:

> "We come, therefore, to the conclusion of fact that the assured could not, by any means which *he could reasonably be called upon to adopt*, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie and consequently entitled the assured to come upon the insurers for total loss."
>
> Stringer vs. Eng. etc. Ins. Co., L. R. 4 Q. B. 676, on appeal 5 Q. B. 599.

See also, Kent, C. J., in Gardere vs. Columbian Ins. Co., 7 Johns. 517.

Now, did not the parties in this case do everything which a reasonably prudent uninsured man could be expected to do, under like circumstances? They came ashore in a new and unsettled country; thousands of people stranded; affairs in a chaotic condition; no courts or established modes of procedure; no market; no means of raising money; money very scarce and held at exorbitant rates, and even then, only to be had as a favor; the initial trip of the company; their agent, sent there to prepare the way for them, mortally ill, and his funds gone; the salvors

insisting upon the sale of the property; refusing to recognize the master, and laughing at his pretentions supported in their claim by the only authority then at the place; and even if a salvage compensation could have been arranged, the vessel and cargo were nevertheless in a situation which, in the opinion of everybody then at the place, including defendant's agent, made it necessary that it should be sold *on board the ship* as the best means of saving what there was left. To this end it was surveyed and condemned. The law required it to be sold to adjust the loss. Yet in the face of this showing it is seriously urged that the court should have given a peremptory instruction upon this point in favor of the defendant upon the contention that notwithstanding these conditions, the master or some one else should have gone through the bare formality of offering "to arrange with the salvors the amount " of their salvage charge, to finance for this, to secure the " delivery of the goods, and take them from the vessel " to the shore" (pp. 58-59).

Taking the evidence as a whole, does it not appear absolutely certain that, in the language of the master he did not do anything looking to making an arrangement to get the goods out of their possession "because I had no resort to do anything" (p. 270).

Had a salvage arrangement been made, it must still have been sold on board ship if the board of survey and the witnesses are to be believed respecting its condition and situation. The supreme question was not, What amount the salvors were to have? but, What was the best practical means of saving something from the wreck? The salvors were willing to have their rights adjudicated

by a court *when it should arrive* (Gollin, p. 99), but they insisted upon the sale going on (Gollin, p. 100; Colcord, pp. 117-118).

With respect to the alleged failure of the master to make a contract with the salvors before permitting them to take hold of the vessel, it will be borne in mind that the cargo here in question is only a small portion of the entire cargo then on board the vessel. That the master testified if the Corwin people had not come along and rescued her as she did, "I presume that she would have soon " went to the bottom. I was prepared to abandon the " 'Sudden'. I had no means to save her. I did all I " could to save her. As far as I was concerned, she was " a goner" (p. 57). "I did not enter into an arrange- " ment with the captain of the 'Corwin' at that time or " with anybody else on board the 'Corwin' at that time as " to what should be charged for saving anything, except " the lighterage plant. I did not expect and they did " not expect to save anything when they commenced upon " it, so I could not make any arrangements" (p. 267). " We did not suppose he would ever get the 'Catherine " Sudden' up and if he did not have all the appliances in " the world he never would. He would not have got the " water out of her" (p. 299).

It will be remembered that at this time the "Sudden" was almost entirely submerged. There was no means of knowing to what extent the cargo had been damaged. The situation is described by the master as follows:

" If you were on board of a ship and had only a place " as big as that to stand on, about two by four, and the " vessel going down, if you did not know but what she

" would be going down any minute, what would you know " about anything going on?" (p. 49).

It is not urged that such a contract could then have been made with reference to the cargo, but *only that no effort* was made in that direction. Is it reasonable to suppose that under the circumstances any effort in that direction would have been successful? Are we to be penalized for not going through a dumb show, when the situation was such that no reasonable man could expect his efforts to be successful?

We do not feel that this contention merits any attention on our part. The court left the question to the jury under proper instructions, and we do not see how, in view of the evidence, its action in that connection can be criticised.

IV.

The next proposition urged by appellant is:

THAT THE GOING INTO THE ICE WAS IN EFFECT A WILFUL DESTRUCTION OF THE PROPERTY, AND THEREFORE THE INSURANCE COMPANY IS NOT LIABLE (pp. 70-79).

This matter is covered by instructions Nos. 13 and 14, p. 332.

The evidence is uncontradicted that the vessel was sent out in the care of the master, with instructions to do what he thought best, and what he should do in that respect was a matter of seamanship.

"I had no orders from the owners of the vessel in rela-

" tion to the time that I was to make on that trip in going " from here there. *I was master of the vessel and was to do* " *what I thought best.* I had no directions from the " owners in regard to putting in at any port on the way " up before to the Behring Sea. In going from San Fran- " cisco to Nome on that particular trip I had no instruc- " tions or directions from any officer or agent of the Nome " Beach Lighterage & Transportation Company as to " whether or not I should put into Dutch Harbor on the " trip. * * * When I first sighted the ice, I presume I " might have put about if I desired, and have gone to " Dutch Harbor. As a matter of seamanship, I could have " done it, because I could have come back to San Francisco " if I so desired" (p. 48).

So also, the issue raised by the answer is simply an issue of the good seamanship of the master in adopting that course and nothing else.

" Defendant is informed and believes, and upon such in- " formation and belief alleges, that plaintiff sailed the " said 'Catherine Sudden' into said ice, knowing full well " that so to do endangered the safety of said vessel, and " that so to do *was not consistent with good seamanship* or " with due and proper care, and that plaintiff, *when ice* " *was encountered,* in the exercise of proper care *should* " *have changed the course of said vessel* and have sought " open water or a port of safety until danger from ice be- " tween San Francisco and Nome had passed" (Record, pp. 35, 36).

Nobody but the master could, when ice was encountered, have changed her course.

It cannot, therefore, be contended that the owners sent the vessel into the ice with the intention of destroying her. They left it to the judgment of the master, who was on the spot and could best determine the propriety of going in. Both the answer and the evidence, therefore, confine the issue to the acts of the master.

I. It is One of the Risks Assumed by the Policy—It was, however, under this evidence, no fault of anyone. So far as the evidence shows it was usual and customary in that trade (pp. 307-8-9). Over thirty vessels similarly constructed were in the ice with her, bound on the same voyage (p. 49). It was the general practice (pp. 303, 307). It was, therefore, a risk contemplated by the policy. In fact, Davis, General Manager of the defendant, testifies: "I knew the nature of the voyage the 'Catherine " Sudden' was going on, and that it was more than ordin- " arily perilous and risky" (p. 63). And he received a larger premium for it (Id.).

Speaking of the act of a master in continuing seal fisheries after being warned away by the Government of Buenos Ayres, in consequence of which he was finally seized, Judge Story said:

> "The underwriters were bound to know the ordinary perils of the trade as much as the owner of the ship; and they took upon themselves the ordinary risks arising from the known claims and decrees of the Buenos Ayrean Government."
>
> Williams vs. Suffolk Ins. Co., 29 Fed. Cas. p. 1405, 3 Sumn. 276.

2. The Instruction Accurately States the Law—However, we will assume, for the purpose of the present argument, that the master was in fault in going into the ice, and that it was a wilful act upon his part. This would not excuse the insurer. Under the provisions of our Code (§2629),

> "An insurer is not liable for a loss caused by the wilful act of the *insured;* but he is not exonerated by the negligence of the insured *or of his agents or others.*"

A fair construction of this statute would be, that, to exonerate the insurer, the wilful act, if any, must be that of *the insured,* and not of his agents, for it will be observed that with respect to the "wilful act", the provision speaks only of the insured, while with respect to negligence it speaks both of the insured and his agents, thus showing an express intent to confine the exoneration of the insurer to the wilful act of the insured himself, and not to include the wilful act of an agent.

This distinction was observed by Story, J., in the case of Catlin vs. Springfield F. I. Co., 1 Sumn. 434, where the policy exonerated the insurance company from losses by "design of the assured". The court remarked:

> "The losses excepted are not losses by design, generally, but 'losses by design of the assured'. The case then is reduced to the consideration of what constitutes a loss by design in the assured within the meaning of the policy. I say that it is not a loss by the mere negligence or laches of the party, where he has left the property exposed to the peril, but has not co-operated directly or indirectly with those who produced the loss. Design imports plan, scheme, intention carried into effect. The loss to be

> by the design of the assured, in the sense of the policy, must be by incitement, connivance or co-operation of the assured, directly or indirectly *with the persons who were agents* in the act."

So here, the "wilful act" excepted is not a "wilful act" generally, but the "wilful act of the insured", and does not include the wilful act of "the persons who were agents in the act".

Barber, in commenting upon the above section of the Code, says:

> "The prevailing doctrine is, that acts of the assured or his agents intentionally though negligently done, resulting in the loss of the insured property through the operation of the destructive agency insured against, do not preclude a recovery on the policy in the absence of some provision to that effect" (p. 123).
>
> "It seems, as the general result of the authorities, that in the absence of some stipulation to the contrary in the policy, the insurer is liable for a loss caused proximately by the operation of the peril insured against where such operation was induced by an act or omission of the assured (not violating any warranty in the policy) found by a court or jury to have been merely negligent, and *free from any intent that such act or omission should result in loss or injury to the insured property*" (p. 127).

This is also the construction placed upon the section by the Supreme Court of the State of California, where it is said that the object of the framers of the Code was to do away with the very question here raised by appellant under the authorities which he quotes:

> "The ordinary negligence of the insured and his agents has long been held as a part of the risk which

the insurer takes upon himself, and the existence of which, where it is the proximate cause of the loss, does not absolve the insurer from liability. *But wilful exposure—gross negligence—negligence amounting to misconduct, etc., have often been held to release the insurer from such liability.*

"*To set at rest questions involving the different degrees of negligence, and the results following therefrom, we may reasonably suppose was the object of the framers of our Civil Code.*

"Under Section 2629 of the Civil Code *the nice distinctions often made necessary are dispensed with, and the general proposition is established that no form of negligence* on the part of the insured, or his agents, or others leading to a loss avoids the policy, unless it amounts to a wilful act *on the part of the insured.* The Code thereby sets at rest a fruitful cause of litigation." McKenzie vs. Scottish U. & N. Ins. Co., 112 Cal. 557.

Since the provision of the Code is, by the very terms of the policy, controlling, this should set the entire question at rest.

This is also in accord with the views of the subject as expressed by the Supreme Court of the United States in Ins. Co. vs. Adams, 123 U. S. 67, where the court said:

"But it is insisted that the Court should have granted the request of the Company to the effect that it was not liable if the accident and loss were caused by the 'misconduct' of the master. Had that request been granted, in the form asked, the jury might have supposed that the Company was relieved from liability if the master was chargeable with what is sometimes described as *gross negligence* as distinguished from simple negligence. Hence the Court properly said, in effect, that the misconduct of the master, *unless affected by fraud or design, would*

> *not defeat a recovery on the policy.* The principle upon which the Court below acted was that expressed by Chief Justice Gibson in American Ins. Co. vs. Insley, 7 Pa. 229, when he said that '*Public policy requires no more than that a man be not suffered to insure against his own knavery, which is not to be protected or encouraged by any means;* for though the *maxim respondent superior* is applicable to the responsibility of a master for the acts of his servants, yet the insured, so long as he acts with fidelity, is answerable neither *for his servants nor for himself.*' Williams vs. Suffolk Ins. Co., 3 Sumn. 276."

See also, The Barnstable, 84 Fed. 901.

Accordingly, in a case involving the same facts as the case at bar, being a case against another insurance company upon the same vessel, for the same voyage, Judge Morrow held that the facts of the case were distinctly within the rule above set forth, and that the misconduct of the master, unless effected by fraud or design, would not defeat a recovery under the policy.

> Nome Beach Lighterage & Transportation Co. vs. Munich Assurance Co., 123 Fed. 820-*826.*

3. The Policy Covers Barratry—In addition to the foregoing, it will be noted that the policy here in question covers insurance "against the barratry of the master or mariners" (p. 19), and hence was in express terms an insurance against misconduct of the master amounting to fraud or design, since that is the very definition of "barratry". 1 Phillips on Ins., §1062.

Appellant attempts to escape this conclusion by the citation of Grim vs. Phoenix Ins. Co., 3 Johns. 451, but the misfortune of that attempt lies in the fact that the

case of Grim vs. Phoenix is not only expressly overruled in New York (11 N. Y. 20), but it is also discredited by the Supreme Court of the United States.

Upon this subject the court, in the above case of Orient Mutual Ins. Co. vs. Adams, 123 U. S. 67, said:

> " In Columbia Ins. Co. vs. Lawrence, 35 U. S. 10 Pet. 517 (9:516), which was a case of insurance against fire on land, the court said that: 'A loss by fire occasioned by the mere *fault or negligence* of the assured, or his servants or agents, and *without fraud or design,* is a loss within the policy, upon the general ground that the fire is the proximate cause of the loss, and also upon the general ground that the express exceptions in policies against fire leave this within the scope of the general terms of such policies.' In the subsequent case of Waters vs. Merchants' Louisville Ins. Co., 36 U. S. 11 Pet. 224 (9:696), it was said, in reference to the case of Columbia Ins. Co. vs. Lawrence, that 'The court then thought that in marine policies, *whether containing the risk of barratry or not,* a loss whose proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners.' To the same effect are Patapsco Ins. Co. vs. Coulter, 28 U. S. 3 Pet. 237 (7:665); General Mut. Ins. Co. v. Sherwood, 55 U. S. 14 How. 352 (14:452), and Phoenix Ins. Co. vs. Erie & W. Trans. Co., 117 U. S. 325 (29:879)."

It is therefore plain that, since the evidence is undisputed that the insured did not send the vessel into the ice, but left the manner of proceeding to the judgment of the master, if it was in fact improper to go there, whether the act was prompted by "gross" negligence or "fraud or design", of the master it was equally covered by the policy.

We may consider it settled law for this jurisdiction that gross negligence of the master does not excuse the insurer. Indeed, gross negligence of the insured himself, does not excuse, for, "so long as he acts with fidelity he is " answerable neither for his servants nor for himself".

We do not think there is any profit in taking up the consideration of the other authorities cited by appellant under this head. The quotation from Emerigon and Phillips (pp. 75-6-7) are not in conflict with our position, except in so far as the quotation from 1 Phillips, §1046 a (77) refers to "gross negligence", and in this respect it is in direct conflict with what we have seen is the meaning of our Code as construed by the Supreme Court of California, as well as in conflict with the opinion of the Supreme Court of the United States.

It is to be noted, however, that the citation from Phillips does not point to either negligence or misconduct of an agent of the insured, but only to that of the insured himself.

The other citations on pages 74 and 75 if not directly overruled, are certainly superseded by the later authorities above referred to, in which the question has been finally settled for us.

It is well to note that Williams vs. New England Ins. Co., is founded on authorities distinctly discredited by Judge Story in Williams vs. Suffolk Ins. Co., 3 Sum. 276 (29 Fed Cas. p. 1404-5) and in which he says that Cleveland vs. Union Ins. Co. "can hardly be considered as " satisfactory authority". A note to the case (29 Fed. Cas. p. 1406), informs us that the ~~New England Ins. Co.~~ Case of Cleveland vs Union Ins. C

case was never retired, but the insurers paid because it was "understood Chief Justice Parsons expressed a decided "opinion against the underwriters and recommended a "settlement". Neither Justice Parsons nor Justice Thatcher had sat on the original hearing.

V.

We think the questions raised by the instructions mentioned in appellant's brief under headings V and VI (pp. 79-83) are fairly covered by the points made in the foregoing argument and as appellant contents himself with a mere memorandum reference thereto, we do not think it necessary to tax the patience of the court any further in that direction.

1. In passing we point out that the appellant erroneously suggests on page 82 that there is no evidence to support the statement "that the captain "of the revenue cutter then at Nome was recognized as "an authority to determine the question of salvage, that "he acted as an arbitrator between the insured and the "salvors", and as such gave the ship and cargo to the salvors.

The master testifies (Rec. p. 59):

"I mean when I say that Capt. Tuttle of the 'Bear' "gave it all to the 'Corwin', that there was no court "there, and Captain Tuttle was the court. They called "a meeting and decided that what Capt. Tuttle said was "law. I had a conversation with Capt. Tuttle about the "goods being turned over; I asked him why he gave

" it to the 'Corwin'—gave it all to them and he said, as " long as the ship was going down, and they saved her, " that they ought to have it all."

Capt. Hibbard says, p. 121: "The government in that " country at that time was entirely in the hands of the " revenue officers, who took the place of the courts."

2. The suggestion that the court confused the question of seaworthiness with that of an intentional assumption of the risk in putting the vessel into the ice, leaves out of sight, the real issue as made by appellant himself. The instruction was in strict accord with the defense as appellant himself stated it:

" One of the points that will be submitted to you in this " case is, whether or not this plaintiff sent, under the cir- " cumstances, at that season of the year and at that time, " a seaworthy vessel upon that voyage. There is no " question but what she was seaworthy so far as open " water is concerned, but whether or not sending that " vessel up with Captain Panno, who was in charge of " her, under instructions to get into Nome at the opening " of the season, *they did not knowingly send a vessel that* " *was incompetent to go through the ice under those cir-* " *cumstances simply to her death if she went in the ice.* " THAT PROPOSITION INVOLVES A TECHNICAL DEFENSE ON THE " QUESTION OF SEAWORTHINESS, AND HIS HONOR WILL IN- " STRUCT YOU IN THAT REGARD. That is not our principal " defense, but that is one of them. Whatever the fact " might be about the 'Snidden's' seaworthiness in open " water, or in ordinary sea, we are not claiming that she " was unseaworthy in those particulars. Our claim is that

" she was not a ship that was fit to be put into the floating " ice of Behring Sea at that season of the year" (pp. 45-46).

3. The cases cited on p. 85, to the effect that sale at Nome under claim of salvors is not a loss by "perils of the sea" are no longer law even in England, since the decision of the case of Aitchison vs. Lohre, 4 App. Cas. 755.—See 100 Fed. 309-313; and they certainly are not law here. See ante, p.

VI.

THE RECORD DOES NOT CONTAIN A VALID BILL OF EXCEPTIONS TO THE INSTRUCTIONS.

We have thus carefully gone over the disputed instructions because we desired the court to see that our case was not based on technicality but on justice, and also from a certain sense of duty to the end that the trial court be not placed in a false position.

The appellant is, however, not, on this appeal, entitled to raise any question regarding the instructions, because he has not taken proper exception thereto. The omnibus exception which he did take could give the lower court no opportunity to correct any error, if error there be, but could only serve to entrap him. The record is as follows:

" Defendant, at the conclusion of said charge, and " while the jury were still at the bar, duly excepted in " writing to the refusal of the court to give the instruc- " tions requested by defendant, and to each separate re- " fusal of the court to give each separate instruction re-

" quested by defendant and to the giving of each instruc-
" tion given by the court at the request of plaintiff, and
" to the giving of each instruction which was in fact
" given, and its said exceptions and each of them were
" allowed by the court" (p. 333).

The rule is well settled that this is not such an exception as can be reviewed in the appellate court. The general rule is thus stated in Mobile, etc., R. Co. vs. Jurey, 111 U. S. 584 (28 L. Ed. 532):

> "Conceding that the charge in respect to the rate of interest was erroneous, the judgment should not be reversed on account of the error. The charge contained at least two propositions: first, that the measure of damages was the value of the cotton in New Orleans, with interest from the time when the cotton should have been delivered; second, that the rate of interest should be eight per cent. It is not disputed that the first proposition was correct. But the exception to the charge was general. It was, therefore, ineffectual. It should have pointed out to the court the precise part of the charge that was objected to. 'The rule is, that the matter of exception should be so brought to the attention of the court, before the retirement of the jury to make up their verdict, as to enable the judge to correct any error if there be any in his instructions to them.' Jacobson vs. State, 55 Ala. 151.
>
> " 'When an exception is reserved to a charge which contains two or more distinct or separable propositions, it is the duty of counsel to direct the attention of the court to the precise point of objection.' R. R. Co. vs. Jones, 56 Ala. 507.
>
> "So in Lincoln vs. Claflin, 7 Wall. 132 (74 U. S. xix, 106), the court said: 'It is possible the court erred in its charge upon the subject of damages in directing the jury to add interest to the value of the goods. * * * But the error, if it be one, cannot be

taken advantage of by the defendants, for they took no exception to the charge on that ground. The charge is inserted at length in the bill. * * * It embraces several distinct propositions, and a general exception cannot avail the party if any one of them is correct.' On these authorities we are of opinion that the ground of error under consideration *was not well saved by the bill of exceptions.*''

The special language of the exception now under consideration, viz.: ''to the refusal of the court to give the '' instructions requested by defendant, and to *each separate* '' refusal of the court to give *each separate* instruction, '' etc.'', is passed upon by both the Supreme Court and the Circuit Court of Appeals in the following cases:

Block vs. Darling, 140 U. S. 234 (35 L. Ed. *478*):

The defendants, at the close of the charge, 'excepted to all and each part of the foregoing charge and instructions, and the same was all the charge or instruction given by the court.' 35 L. Ed. *477*.''

The court said:

''2. Although we have jurisdiction, so far as the value of the matter in dispute is concerned, the question is not properly before us as to whether the court erred in its charge to the jury upon the counter-claim. The general exception 'to all and *each part of the foregoing charge and instructions*', suggests nothing for our consideration. It was no more than a general exception to the whole charge. The court below was entitled to a distinct specification of the matter whether of fact or of law, to which objection was made. The charge covered all the facts arising out of the counter claim, and clearly stated the law which, in the opinion of the court, governed the case. If its attention had been specifically called at the time to any particular part of the charge that was deemed erroneous, the necessary correction could have been

made. An exception '*to all and each part*' of the charge gave no information whatever as to what was in the mind of the excepting party, and therefore gave no opportunity to the trial court to correct any error committed by it."

Price vs. Pankhurst (C. C. A., 8th Circ., 1892) 53 Fed. 312:

"The bill of exceptions, after reciting the whole charge, concludes as follows: 'To the giving of which said instruction the defendant specially objects and excepts, and prays that his exception be duly noted of record; said exception being to the whole of said instruction, *and to each and every part thereof.*' The charge contains several propositions of law, some of which are undoubtedly sound. The rule is well settled that, if the entire charge is excepted to in gross, and any portion of it is sound, the exception cannot be sustained (citing cases). Upon the organization of this court, the practice on this subject, as settled by the uniform decisions of the Supreme Court, was formulated into a rule, and adopted as a rule of practice of this court, in the following terms:"

* * * * * * * * *

(The rule referred to is identical with Rule 10 of this Circuit Court of Appeals.)

"This rule was designed to put an end to allowing bills of exceptions like the one in this case. It matters not that the judge may be willing to consent to such a bill. *He cannot waive the rule, so far as it relates to specific exceptions, if he desires to do so.* The rule is not made for the judge's personal protection or benefit, but for the protection of suitors and the advancement of justice. It is the duty of the party excepting to call the attention of the court distinctly to the parts of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain the parts of the

charge excepted to, if it seems proper to do so. The practice which it has been intimated at the bar sometimes obtains of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after the trial; and a general exception to the whole charge, any part of which is good law, is equivalent to silence. *The rule is mandatory. Its enforcement does not rest in the discretion of the lower court. Its enforcement is essential to the proper and intelligent administration of justice.* It serves to correct hasty, inaccurate, or misleading expressions in the charge; it affords an opportunity for explanations and qualifications which might otherwise be overlooked, and sometimes, by removing the ground of exception, prevents further litigation. It is, of course, the duty of the court to allow the parties reasonable time and facilities for specifying exceptions. There is no occasion for haste in charging a jury. No part of the trial should be conducted more deliberately and carefully, and no court will refuse a party time and opportunity to point out distinctly his exceptions to the charge before the case is finally given to the jury. He must be afforded opportunity to do this then, because he is precluded from doing it afterwards. There being no error on the face of the record, *and no error saved by the bill of exceptions,* the judgment of the circuit court is affirmed."

St. Louis R. R. Co. vs. Spencer, 71 Fed. 94:

The record in this case is as follows:

"At the conclusion of the charge, counsel for defendant stated to the court that they noticed that the prayers for instructions submitted by them were not embodied in the charge of the court, and they desired then and there to except to the court's action in refusing to give in charge *each of said instructions,*

which several exceptions were noted. They further stated that they could not, upon hearing the charge read, state to the court their objections to it, but desired *to except to each and every sentence in the charge given,* with leave to state their objections upon the record at some future time. Counsel for plaintiff demanded that counsel for defendant state their objections to the charge given before the jury left the box, to the end that such objections might be considered, passed upon, and if well taken that the charge might be corrected. Counsel for defendant stated that they could not do this, as the charge was oral, and asked that time be given to have said charge written out, that they then might have time to save their exceptions to the same. Thereupon the court announced to counsel, that if it is in the power of the court, they shall have time to examine the charge after it has been reduced to writing, and point out specifically any objections they might have to the same, or any part thereof. And the court noted their exceptions *to each and every sentence in the charge given,* with leave to state their objections in future, to which leave plaintiff then and there objected."

Held, the exceptions could not be sustained.

The cases to this effect are numerous and uniform.

We have already called attention to the fact that Rule 10 of this court is identical with the rules referred to in the foregoing decisions. We, therefore, think that there is nothing before the court on exception to the instructions.

VII.

The Rulings on Questions of Evidence—Of the seventeen assignments of error on questions of evidence, the appellant has included in his specification of error in his brief, but six, and has argued but two, divided into three

sections. We have said "has argued", but the flippant manner in which the question is passed up to counsel for respondent can scarcely be called argument. He says: "It would seem that argument upon these rulings would "be a useless waste of the time of this court. We leave "it to the ingenuity of counsel on the other side to "suggests some possible support therefor" (p. 91).

Under these circumstances we feel that we would be warranted in ignoring the question. The burden is on him who alleges error to prove error, and if he does not see fit to do so there is no occasion for "counsel on the other side" to offer suggestions.

The evidence, however, was proper, and being undisputed, is sufficient to warrant the court in taking the whole case from the jury and directing a verdict for plaintiff in the full amount prayed for.

Mr. Davis was the general manager of the defendant corporation. *The reinsurers were neither parties to the contract of insurance nor to the litigation.* The introductory remarks of appellant, on pp. 88 and 89 of his brief, have, therefore, no legal bearing upon the issue.

As general manager Mr. Davis had a perfect right, if he saw fit, to adjust the loss in any manner he deemed proper, to pay the loss if he saw fit, or to consent to judgment in the present case if he saw fit, and *so far as the appellee is concerned,* the reinsurers had no interest or right to object.

Farnum vs. Phoenix Ins. Co., 83 Cal. 262.

If, before suit brought, Mr. Davis told the assured that he considered its demand just and in all fairness they should receive their money under the policy, that was an adjustment of the amount due and an acknowledgment of liability. The assured makes a demand for his money, and the insurer says: "You are entitled to " it, but for some ulterior reason personal to myself, and " which does not affect your right to the money I will " not pay it." This is an admission of liability made by the defendant itself, and why we are not entitled to the evidence is beyond our understanding.

Counsel admits that the question itself is unobjectionable, by reason of the averment of the complaint that prior to the commencement of the action the loss was adjusted. The question is, "Did you have any conversation with Mr. " Davis, the Manager of the Company, concerning the " payment of the loss and the amount?" The witness then proceeds to tell what the conversations were, *only part* of which appellant moved to strike out. If, as conceded, we are entitled to part of the conversation, then we are entitled to it all.

Moreover, the matter is competent because the allegation in the complaint is not only that said loss was adjusted, but "that the said defendant then and there ad- " mitted the said loss to be a loss by a peril of the sea " and admitted the amount thereof to be $8,250" (p. 6). A similar allegation will be found after each of the causes of action (Art. VIII, p. 10; Art. VIII, p. 13).

The testimony in question is a direct admission of the facts set forth in said allegation and an explanation of the reason why payment was not made accordingly.

It is also plain that this admission was a waiver of the defenses set up in this action. It will be remembered that the testimony shows that Mr. Davis had full knowledge of all the facts in the case, and himself testified that he was satisfied therewith: "The plaintiff notified me and gave "me freely all the information I asked for respecting "that loss. Myself and the reinsurers called a meeting "to hear all the facts of the case. Mr. Van Ness was "at one meeting and asked witnesses on our behalf some "questions respecting this loss. The plaintiffs presented "to me many proofs of loss; I do not remember just "what I asked for at the time, but the proofs, as far as "I am personally concerned, that were furnished, were "satisfactory. * * * Having these facts before me, "I said to the plaintiff regarding its right under the "policy and the amount that should be paid to it, in my "opinion the proofs that were furnished were sufficient, "and the loss should be paid, but that I could not admit "full liability, or liability, on account of being stopped "by my reinsurers" (pp. 60-61).

This statement of Mr. Davis was not objected to by respondent, though there is an objection to another question interjected between the two parts of this statement.

This is substantially the same testimony as that of Mr. Pennell, to which objection is made. Being before the jury without objection, how can it be said that the testimony of Mr. Pennell upon the same subject, even if improperly admitted, was injury?

But to return to our main point, the foregoing, as does also Mr. Pennell's testimony, shows that Mr. Davis at

the time of this conversation "had full knowledge of all " the facts when after the examination of the witnesses " and vouchers it expressed its satisfaction with the " proofs", and admitted that the demand was just and that in all fairness the defendants should receive their money.

This is a waiver of all forfeitures.

Silverberg vs. Insurance Co., 67 Cal. 38;
West Coast L. Co. vs. State, etc., 98 Cal. 512.

We are aware of the fact that in each of the foregoing cases there was, in addition to the knowledge and satisfaction with proofs, a promise to pay, but inasmuch as the reason here given for not paying *was not a valid reason*, the admission of liability and amount is complete.

In the case of Farnum vs. Phoenix Insurance Co., 83 Cal. 262-3, the policy contained a clause requiring arbitration if the parties failed to agree upon the amount of the loss. The plaintiffs furnished to defendants proofs of loss to the extent of one thousand dollars, and thereupon, *without questioning or making any objection to the amount of loss claimed*, or proofs thereof, the company, *for other reasons*, not only denied its liability, but denied the existence of the policy, claiming that it had been cancelled two months before the loss.

The court held:

> " *This was sufficient evidence that the defendant acquiesced in the amount of the loss claimed* and thereby waived its right to have it determined by arbitration."

In the case of Goodwin vs. Insurance Co., 73 N. Y. 480-496, it was said:

> "When an insurance company by means of its officers or agents, in response to a claim for a loss, fails to say anything about the time of presenting the proofs after it has expired, but *claims some other defense, the presumption is that it does not intend to interpose any other besides that named,* and it is a fair inference to be derived from the fact that it was silent upon the subject, that it designed to waive the violation of such a condition. When called upon to adjust a loss was the time to speak by its agents or officers, and in failing to do so, and by silence, it acquiesces in a waiver of any such defense and is, I think, estopped from interposing the same."

So in Cahill vs. Andes Ins. Co., 5 Biss. 211; Fed. Cas. No. 2289, it was held that where a company had claimed to cancel a policy on the ground that the premium had not been paid, *they were bound by the reasons which they had thus assigned*, and could not afterwards rely upon some other reason.

We therefore contend that not only was the evidence competent under the pleadings, but that it is in fact conclusive of the whole case and shuts out all the defenses attempted at the trial.

VIII.

1. It is sufficient reply to the 9th objection (Brief, p. 91) that if for no other reason, the answer was competent because Mr. Gollin's ability was directly put in issue by the appellant himself. The claim being made that he allowed himself to be deceived, it was therefore perfectly

competent to show that he was an experienced insurance man and a man of ability.

2. It was further competent, because, as we have already seen, the nature of the information possessed by Mr. Davis at the time he told the defendants that they were entitled to be paid was a proper matter for consideration.

3. It was further proper because Mr. Davis ratified the acts of Mr. Gollin in consenting to the sale, and it is proper that the nature of the information upon which he made such ratification be placed before the jury.

We respectfully submit that the judgment of the lower court should be affirmed.

Nathan H. Frank,
Attorney for Defendant in Error.